Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1978

No. 78-132

SOLBORO KNITTING MILLS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, SOLBORO KNITTING MILLS, INC., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit issued in this case on March 8, 1978, insofar as and to the extent that decision granted the application of the National Labor Relations Board (the "Board") to enforce its order herein dated January 7, 1977.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix, *infra,*), modifying the decision of the National Labor Relations Board, is reported

at 97 LRRM 3047, but, as of the date of this Petition, has not been officially reported. The Judgment of the Court of Appeals (App., *infra,*) was filed on April 25, 1978. The Decision and Proposed Order of the Administrative Law Judge and the Decision and Order of the National Labor Relations Board affirming in part and modifying in part his decision and recommended order (App., *infra,*) are reported at 227 NLRB 738.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

Questions Presented

1. Whether Solboro was properly ordered to bargain on demand, with Local 107, ILGWU; where the Board failed to explain whether and why present conditions are still so "contaminated by Solboro's alleged unfair labor practices as to prevent the holding of a fair and untrammeled election among the employees to decide whether or not they wish to be represented by Local 107," despite the passage of time and large turnover of employees since the occurrence of those alleged unfair labor practices.

2. Whether the Board could find that the petitioner had violated section 8(a)(5) of the National Labor Relations Act, 29 USC § 158(a)(5) [i.e. had failed to bargain in good faith with Local 107, on demand] where no such violation had been charged against the Company, nor litigated, nor found by the Board's Administrative Law Judge.

3. Whether statements not authorized by petitioner, and which were made by an employee of petitioner who was not a supervisor, were nevertheless attributable to petitioner, so that petitioner could be found to have violated §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 USC §§ 158(a)(1) and (3), by virtue thereof.

Statutes and Regulations Involved

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USC §§ 151 et seq. are the following:

National Labor Relations Act §2(11), 28 U.S.C. §152(11):

Definitions

Sec. 2. When used in this Act—

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

National Labor Relations Act §7, 28 U.S.C. §157:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other con-

certed activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

National Labor Relations Act §§8(a)(1), (3) and (5) 29 U.S.C. §§158(a)(1), (3) and (5):

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority

of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organiaztion (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership:

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Rules and Regulations of the National Labor Relations Board, 29 CFR §§ 102.15 and 102.17:

Complaint

§ 102.15 When and by whom issued; contents; service—After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where

known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

* * *

§ 102.17 Amendment—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

Statement of the Case

A. *Background*

Petitioner, Solboro Knitting Mills, Inc. (herein "the Company", or "Solboro") is a New York corporation engaged in the manufacture of knitted sweaters. Murray Harkavy, president, and Rita Harkavy, secretary-treasurer, manage the Company and supervise its daily operations.

During the 1974 fall season, the Company employed approximately thirteen employees to operate its machinery and perform related unskilled tasks. The employer-employee relationship at Solboro is informal. The Secretary-Treasurer of the Company spends her day at the plant, in the shop, personally directing the production force, actually assisting in the work herself, alongside the other employees (e.g., R.356, 388, 471, 920).[1] She has constant

1. "R" references are to pages of the printed Record, i.e., the Appendix in the Court of Appeals, which Petitioner has requested that Court to certify and transmit to this Court.

contact with her employees regarding their work (A.920); she frequently asks employees, especially the older employees, "Whats going on" (R.471, 480, 968).

The Company's operations are seasonal. Business conditions in the apparel industry were depressed in the fall of 1974, and the Company's shipments or orders were already dwindling (R.794-797) when the Company received a telegram on September 30 cancelling a complicated, labor-intensive Sweater-Bee order. Less than one week earlier, the Company was told by its accountant that it had lost $15,000 during the previous year.

Just a few days later, Union representative Gaspar Sciacca came to Mr. Harkavy claiming that Local 107, ILGWU, represented a majority of his employees.

Mrs. Harkavy inquired of Anna Nemec why she had not told her about the Union campaign. Later that day, Mr. Harkavy addressed the employees assembled in the shop.

He said he understood that some of the people wanted to be represented by the Union. He then spoke of the general economic situation of the Company and the industry, that expenses would rise due to Union benefits, that a major order had been cancelled, that he had just been told by his accountant that the Company had lost $15,000 for the previous fiscal year, that Hong Kong competition was on the rise, and finally, that he didn't see how Solboro could survive if all these economic conditions persisted or if there were an additional economic expense. He told his employees that it was their decision to make, but that he wanted to make them aware of the Company's and the industry's financial condition (R. 798-90, 845-47).

Mr. Harkavy's recollection was corroborated by every employee who testified about the speech, including witnesses for the Union who were found "very impressive" by the finder of fact. (R.330, 532-33, 567-68, 764-67, 622, 629-30, 37, 4, 655).

Nevertheless, the Board found that the employees could reasonably have inferred that the Company had threatened plant closure for their support of the Union, in violation of §8(a)(1) of the Act, a finding affirmed by the Court of Appeals.

The Board, with Court approval, also found that Solboro violated §8(a)(1) of the Act by virtue of anti-union statements and threats to employees attributed to Mrs. Harkavy, and by virtue of Mrs. Harkavy having interrogated employees about their union activities and support.

The record is clear that Solboro's business is seasonal; that the season's end was at hand when the Union arrived on the scene; that the Company's knitting machines were already limited to turning out samples and new designs weeks before the Union's demand for recognition, thus creating the production fall-off which justified the layoffs that followed; that the Company had experienced the cancellation of a major in-production order, the first in its experience, on September 29, just days before the Union business agent appeared; that some employees, by the end of September, were being given make-work, and were either finishing up orders for shipment or already working on material that would stay on the shelf and not be shipped out at all; and that October was a very slow month (R.192, 459-63, 476, 556-57, 627, 680-84, 689, 708-10, 725-29, 792-802 820-24, 835, 869-71, 922, 932-33).

However, the Court of Appeals found ample evidence in the record to support the inferences drawn by the Board that "the layoffs of the four union supporters were expedited on the basis of discriminatory considerations in violation of section 8(a)(3) of the Act", (Appendix, *infra.*) as well as the Board's conclusions that the company refused to reemploy them at the beginning of the next season for the same reasons.

B. Josephine O'Connell

The Board devoted considerable attention to alleged threats, promises of benefit and coercive statements of Josephine O'Connell, who on October 5 began circulating a petition among employees repudiating the Union.

Mrs. O'Connell worked like other employees, at different jobs, including floor work, steaming and packing (R.370, 685, 716). She had no dealings with employees regarding their wages, time off, hiring, firing, or transfers; she had no authority effectively to recommend any of the above such actions; she did not answer questions for employees concerning their work (R.718-720, 908). Rather, O'Connell worked on an hourly basis, and was paid time and a half for overtime (R.717). Her rate of pay, $2.40 an hour (R.717), was even less than the rate for Grace Rugolo, the Union organizer and a recent hire (R.663).

Mrs. O'Connell had no independent authority to issue instructions or directions to employees concerning their work. She could relay instructions to employees, but only those which she received directly from Mrs. Harkavy (R.511, 718, 906). Even those instructions were limited because O'Connell was not competent to tell employees how to do their work (R.977-79).

Mrs. Harkavy specifically told the employees that O'Connell was not a forelady (R.513-515); and contrary to the conclusion of the Board (R.39) and the unsupported assertions of General Counsel in its Court of Appeals brief, the record clearly reveals that the employees did *not* consider her to be a person of authority or an agent of management. For example, Margaret Passannante, one of the alleged discriminatees, testified that she never received instructions from Mrs. O'Connell and never had reason to (R.370). Mary White, another witness for the Board, testified that she received instruc-

tions about her work from no one other than Mrs. Harkavy (R.423). Other employees testified that they knew that Jo O'Connell was *not* a forelady (R.510, 631, 642, 685).

Finally, employees, including witnesses for the Board, consistently testified that whenever Mrs. O'Connell spoke *for* Mrs. Harkavy (known in the shop as Mrs. Murray), she would preface her remarks with words such as: "Mrs. Murray wants you to do this", or "Mrs. Murray said for you to do that" (Carmella Cacoperdo, R.525; Donna Moravec, R.616-17; Julia Delfino, R.682). Mrs. O'Connell also testified that whenever she would relay instructions from Mrs. Harkavy, she would preface her remaks to indicate that the instructions came from "Mrs. Murray" (R.717-18, 749) because this was the easiest way in which she could get employees to respond to those instructions.

The uncontroverted evidence clearly demonstrates that Mrs. O'Connell, who was neither a supervisor nor agent of the Company, undertook to circulate the petition repudiating the Union without the knowledge of the Company; that those employees who signed the petition did so knowledgeably, without being coerced, and of their own free will (Mrs. O'Connell, R.735-38; Donna Moravec, R.583, 602-04; Anna Nemec, R.456, 473-76; Cacoperdo, R.492-93, 515); that Mrs. O'Connell typed the letter herself at home without ever discussing it with management; and that management first learned of the letter, with surprise, when O'Connell showed the signed, *fait accompli* to Mrs. Harkavy (R.737-38, 912, 973-74).

Nevertheless, the Board held that Mrs. O'Connell's activities were attributable to the company and that Solboro violated the Act by virtue of her activities.

C. The § 8(a)(5) Violation

Throughout the entire proceedings before the National Labor Relations Board, at both the Administrative Law Judge level and on review by the Board itself, Solboro was never charged with having violated § 8(a)(5) of the Act.

Nevertheless, at the time of its review of the ALJ's decision, the Board raised *sua sponte* and without prior notice to Solboro, the allegation that it had violated § 8(a)(5). The Rules and Regulations of the Board provide that a complaint may be amended *upon motion*. However, the Board did not comply with its rules and did not give the Company notice of this alleged § 8(a)(5) violation by properly amending the complaint.

The Board itself in its brief to the Court of Appeals, acknowledged that "almost" every element of a § 8(a)(5) violation was litigated. The Administrative Law Judge specifically noted: (a) the absence of any 8(a)(5) against the company contention, (b) that respondent had asserted the inadequacy of the bargaining demand at the hearing, and (c) that while respondent appeared to abandon this position in its brief, the issue was *irrelevant* in the absence of any 8(a)(5) contention (R.49, n. 76).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Second Circuit upholding the order of the National Labor Relations Board requiring petitioner to bargain with the Union is inconsistent with this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) and conflicts with decisions in other circuits inasmuch as the Court failed to require the Board to explain whether any why present conditions are still so contaminated by petitioner's alleged unfair labor practices as to prevent the holding of fair and untrammeled election among the employees, despite the passage of time and large turnover of employees since the occurrence of those unfair labor practices.

It is well established that the preferred method for ascertaining whether a union has majority support is a secret ballot election conducted by the Board through its procedures under § 9(c) of the Act (29 U.S.C. § 159(c). *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 596-7, 602-3 (1969).

Thus, this Court has established two categories of cases where bargaining orders may issue without the holding of an election.

In cases marked by "outrageous" and "pervasive" unfair labor practices, where the Board may issue a bargaining order *without* prior showing of majority support, a bargaining order is appropriate only if the unfair labor practices are of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, "with the result a fair and reliable election cannot be had."

However, the Board may issue a bargaining order requiring an employer to bargain with a Union which has obtained authorization cards from a majority of its employees, in the absence of an election, where an employer

has committed less pervasive independent unfair labor practices which have made the holding of a fair election unlikely. *NLRB* v. *Gissel Packing Co.*, supra.

Of course, there is a third category of cases where less extensive unfair labor practices has occurred. This case should be treated as a "third category" case. Josephine O'Connell's anti-union conduct apparently is the major basis for the Board's finding that the company committed serious unfair labor practices consisting of threats, promises of benefit, soliciting employees to repudiate the union, etc., in volation of section 8(a)(1) (R. 39-41) (Board brief to Court of Appeals at 7-8, 17-21, 41). There is no basis in law or fact for holding that the Company committed unfair labor practices on the basis of conduct of employee Josephine O'Connell (infra, pp. 18-21).

But even if this is characterized as a first or second category case,[2] a bargaining order is inappropriate because the Board failed even to consider whether a free and untrammeled election could have been held at the time the Board issued its order, in view of the seasonal nature of Solboro's business, the high rate of employee turnover (A. 29, 193-235) and the passage of time since the case had arisen,

> "Since it is the present work force that stands to be deprived of exercising its free choice in the preferred election process, the fact that it is substantially different from the one which existed at the time of the misconduct militates against issuance of a bargaining order. . . "

Peerless of America, Inc. v. *NLRB*, 484 F.2d 1108, , 83 LRRM 3000, 3010 (7th Cir., 1973), *NLRB* v. *Gruber's*

2. The Board did not choose to characterize the case as one or the other.

Star Market, Inc., 501 F.2d 697, 87 LRRM 2037 (7th Cir. 1974). But see, contra, *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 94 LRRM 2772 (9th Cir. 1977).

In Gissel the Court made it plain that a bargaining order should be issued only when "the possibility of . . . ensuring a fair election . . . by the use of traditional remedies, though present is slight." 395 U.S. at 614.

Compare, e.g., *M.S.P. Industries, Inc.* v. *NLRB*, 568 F.2d 166, 97 LRRM 2403 (10th Cir., 1977), where it was found that the Board properly refused to enter a *Gissel* bargaining order despite "pervasive" unfair labor practices since certification and a duty to bargain already existed by virtue of an election among employees.

The Second Circuit Court of Appeals failed to remand this case to the Board to consider and make specific finding on this issue, despite the fact that other Circuit Courts of Appeal have done so in similar cases involving seasonal business, high employee turnover and passage of time. *NLRB* v. *American Cable Systems, Inc.*, 427 F.2d 446, 73 LRRM 2913 (5th Cir. 1970) *cert. den.* 400 U.S. 957 (1970), *NLRB* v. *Gibson Products Co.*, 494 F.2d 762, 86 LRRM 2637 (5th Cir. 1974), *Peerless of America, Inc.* v. *NLRB, supra, NLRB* v. *Gruber's Star Market, Inc., supra, Shulman's, Inc.* v. *NLRB*, 519 F.2d 498, 89 LRRM 2729 (4th Cir. 1975), *NLRB* v. *Armcor Industries*, 535 F.2d 239, 92 LRRM 2374 (3rd Cir. 1976). Indeed, the Second Circuit has also recognized this principal in prior cases, though it did not apply it here. *NLRB* v. *General Stencils, Inc.*, 472 F.2d 170, , 82 LRRM 2081, 2084 n.5. (2d Cir. 1972).

As the Fifth Circuit stated in *American Cable Systems, Inc., supra,*

> We think it clear from the foregoing that the Court in Gissel clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election.

Thus the Court remanded the matter to the Board to determine whether the employer's "1965 violation of §8(a)(1) and (3) have a 1970 existence."

The failure of the Second Circuit to require the Board even to consider whether a free election could have been held at Solboro at the time of its bargaining order and to make specific findings with respect thereto, in conflict with decisions of other Circuits and in disconsonance with this Court's *Gissel* decision, should compel the Court to grant certiorari herein.

II.

The decision of the Court of Appeals for the Second Circuit upholding the ruling of the National Labor Relations Board that petitioner violated section 8(a)(5) of the National Labor Relations Act, 29 USC § 158(a)(5), where no such violation had been charged against the petitioner, is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Drug Package, Inc.* v. *NLRB*, 570 F.2d 1340 (1978); operated to deprive petitioner of due process of law; and is inconsistent with the principal that administrative agencies adhere to their own rules.

The Board erred in raising, *sua sponte,* at the time of its review of the Administrative Law Judge's decision, the allegation that Solboro violated section 8(a)(5) of the Act. The Rules and Regulations of the NLRB, section 102.17, state that a complaint may be *amended* by the Board, *upon motion,* at any time prior to the issuance of an order by the Board (emphasis added). In the case at bar, the Board did not comply with its rules: It did not move to amend the complaint, nor did it amend the complaint without

making a motion. Indeed, the Board *never* gave the petitioner any notice that a section 8(a)(5) charge was pending against petitioner, or was being considered by the Board, and thus the Company did not have full and fair opportunity to refute this charge. *Compare,* e.g., *Fire Alert Co.,* 223 NLRB 129, 130 n. 5 (1976).

This is not a procedural technicality, because *not* all elements of an 8(a)(5) violation were litigated.[3] The Administrative Law Judge specifically noted: (a) the absence of any 8(a)(5) contention, (b) that respondent had asserted the inadequacy of the bargaining demand at the hearing, and (c) that while respondent appeared to abandon this position in its brief, the issue was *irrelevant* in the absence of any 8(a)(5) contention (R. 49, n. 76) (emphasis added). Thus Solboro was in fact denied a full and proper hearing on one major aspect of an 8(a)(5) violation. Respondent did not fully develop its contention as to the inadequacy of the bargaining demand at the hearing, in its brief to the Administrative Law Judge, nor in its appeal to the Board, because at no time was that issue relevant to the charges the Company was on notice to defend.

It is axiomatic that since petitioner was not fully appraised of the charges against it and did not have an opportunity fully and completely to defend itself, petitioner was denied due process. *Sarzen* v. *Gaughan,* 489 F.2d 1076 (1st Cir. 1973). The statements by the Board and the Court that the § 8(a)(5) violation *was* fully litigated are contradicted by the Administrative Law Judge, who was the actual trier of fact.[4]

3. The Board admitted as much by stating in its brief to the Court of Appeals that "almost" every element of the § 8(a)(5) violation was litigated.

4. The ALJ's suggestion that even if fully litigated he would have determined this issue against the Company merely indicates that he had made up his mind before hearing full and complete argument. It indicates greater, not lesser, prejudice to the petitioner by virtue of the conduct of the proceedings.

The Board erred in blindly following the rule from *Trading Port, Inc.,* 219 NLRB 298 (1975). The Board neglects to note that, in contrast to the case at bar, the original charge in *Trading Port* did allege an 8(a)(5) violation. Moreover, *Steel-Fab, Inc.,* 212 NLRB 363 (1974), and *White Pine, Inc.,* 213 NLRB 566, 567, reflected the status of Board law when the complaint against Solboro was served and the matter tried. *Compare,* e.g., *South Station Liquor Store, Inc.,* 223 NLRB 1115 (1976). The policy expressed in those cases, that the injection of "artificial and superfluous" findings of 8(a)(5) violations are not necessary for a bargaining order under the rule of *NLRB* v. *Gissel Packing Co., supra,* should apply to a case where no 8(a)(5) violations are charged. Therefore, while the employer vigorously contends, *supra,* that a *Gissel* order is not appropriate, the Board's finding on the *Gissel* question is not a justification for finding an 8(a)(5) violation where none had been charged or litigated. *Accord, Ellino Halvorson, Inc.,* 222 NLRB 534, at n. 6 (1976).

The decision of the Second Circuit upholding the Board's finding of a §8(a)(5) violation in these circumstances, conflicts with the decision of the 8th Circuit in *Drug Package, Inc.* v. *NLRB,* 570 F.2d 1340, 97 LRRM 2851 (1978). The Eighth Circuit reversed the Board's decision that Drug Package, Inc. had violated §8(a)(5), noting that (a) the complaint, as amended, contained no allegations of an 8(a)(5) violation; (b) that the Administrative Law Judge made no finding of a section 8(a)(5) violation; (c) the exceptions to the Administrative Law Judge's decision filed by the Union as the charging party did not press a claim for an 8(a)(5) violation; (d) the hearing was conducted prior to the Board's decision in *Trading Port.* As the Court therein stated, "Had the Company been given notice of the possibility of an 8(a)(5) violation and the resulting additional

penalties, it might have litigated the matter differently."

The identical factors are present in the instant case. While Solboro faces no "additional" penalties by virtue of the §8(a)(5) finding, that finding is an independent basis for the bargaining order which is "the most serious remedy imposed in this matter" (cf. *Drug Package, Inc., supra,* 97 LRRM 2854) and which Solboro seeks to overturn.

III.

The decision of the Court of Appeals for the Second Circuit upholding the ruling of the Board that petitioner had violated sections 8(a)(1) and 8(a)(3) of the Act rests on an erroneous conclusion of law that statements of a person not a supervisor are binding on petitioner; is in confiict with decisions of the Court of Appeals for the Eighth Circuit and Fifth Circuit; is inconsistent with other decisions of the Board; and is erroneous in failing to require the Board to follow the principle that like cases should receive like treatment.

The Board concedes that Ms. O'Connell was not a supervisor (R. 39, 53). The Board cites not an iota of evidence that employees viewed her as a forelady or management representative—the evidence is to the contrary. There is not a shred of evidence that O'Connell spoke *for* management or that employees thought her statements about union activities originated with management. Nowhere in the record does it appear that Mrs. O'Connell invoked Mr. or Mrs. Harkavy when she made any of her allegedly coercive statements (i.e., p. 6, supra. E.g., R.523). There is no evidence that she acted at the behest of management. There is no evidence that management knew of her activities and statements. Nor is there any evidence that the employees

were led to believe that she was acting on behalf of management in these activities. The Board cities *no* record evidence to support its conclusion to the contrary, which is mere conjecture.

Yet, even in cases where the "nexus" between management and the employee has been substantially *greater* than here, and where the evidence of such a nexus has been substantially more convincing, the Board, with approval of various Courts of Appeal, has held that the employer was not responsible for the anti-union conduct of those employees. *NLRB* v. *Sayers Printing Co.,* 453 F.2d 810, 79 LRRM 2129 (8th Cir. 1971) (Company could not be charged with responsibility for two employees' actions during union election campaign which consisted of threatening loss of employment, loss of bonuses, and discharge, where substantial evidence on record as a whole did not support determination that they were supervisors and record was void of evidence that they acted at request or direction of management). *Stewart & Stevenson Services, Inc.,* 164 NLRB 741, 742-43 (1967), *modified on other grounds,* 414 F.2d 232, 70 LRRM 2719 (5th Cir., 1969), (employees had no power to hire, fire or recommend change in status of employees, worked alongside other employees, and acted merely as a conduit for the foreman when giving orders); *Paoli Chair Co.,* 213 NLRB 909 (1974), (employee received instructions from the overall supervisor, relayed them to the other employees in the lumberyard routinely, and guided them in their work, but had no power to hire, fire, discipline or recommend such action, was hourly paid and did not attend meetings of supervisors, nor responsibly direct any of the other employees or possess any supervisory indicia); *Rowand Co.,* 210 NLRB 95 (1974), (employee relayed routine instructions from foreman to

laborers as a conduit, did not exercise independent judgment nor have authority to impose or recommend discipline of employees, performed the same type of work and received same as other employees, was neither a supervisor nor agent of the Company); *Western Sample Book & Printing Co.,* 209 NLRB 384 (1974). (employee was not closely allied with management, nor intimately involved in effectuating policies, was merely a senior experienced employee, was considered a supervisor by only one employee, and two of Board's witnesses as well as Company General Manager considered him rank and file); *Redwood Construction Co.,* 192 NLRB 15 (1971). (Company not responsible for anti-union activities of two employees who subsequently advised office manager, an admitted supervisor, who remained silent concerning the incidents: This was not ratification by Company, making it liable for employee's activity. They were not agents of Company within the meaning of the Act. Employees did not hold themselves out as spokesmen for Company. Conduct of two employees was neither authorized nor ratified.)

Thus, Solboro should not have been held responsible for circulation of the "deauthorization" petition.

As the Second Circuit has said in a previous case,

> While the Board has wide discretion in framing remedies, the agency has a correlative duty to explain its imposition of a remedy in one case and its failure to do so in a seemingly similar—or even stronger one on a basis reviewing courts can understand.

NLRB v. *General Stencils, Inc.,* 438 F.2d 894, 905, 76 LRRM 2288 (2d Cir. 1971).

However, in this case, that Court has indeed "abdicated the conventional judicial function," which includes "prevent [ing] capricious determinations by administrative agencies"

by failing to require the Board to explain its conflicting determinations, to the prejudice of petitioner. *Id.; Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490 (1951).

Conclusion

For the reasons set forth above, the petition should be granted.

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